Kwong Hing Enterprises Sdn Bhd & Anor v Diamond C Management Corp

HIGH COURT (KUALA LUMPUR) — WRIT SUMMONS NO WA-22NCvC-562–10 OF 2022
LEONG WAI HONG JC
17 FEBRUARY 2023

Civil Procedure — Injunction — Ad interim injunction — Plaintiffs operated 24-hour carparking business in basements of building — Management corporation of building closed roller shutters of sole entrance or exit to basements for security purposes — Plaintiffs applied for ad interim injunction to prevent management corporation from shutting roller shutters — When court would grant ad interim injunction pending inter partes hearing of injunction application — Whether management corporation of strata development could obstruct or hinder rights of access of strata owner to his property on ground of security — Federal Constitution art 13(1) — National Land Code s 44(1) — Strata Management Act 2013 — Strata Titles Act 1985 s 34(1)(a)

The first plaintiff as the owner of Basement 1 and Basement 2, Block C of an office and retail complex ('the property') had let out the property to the second plaintiff to carry out an automated 24-hour carparking business. The problem arose when the management corporation of the building ('the defendant') decided to close the roller shutters located at the sole entrance/exit (for vehicles) of the plaintiffs' basements every Monday to Friday (from 8pm to 6am) and every Saturday to the following Monday (from 2:30pm). The defendant contended that the closing of the roller shutters was for security purposes and the defendant had in fact conducted extraordinary general meeting ('EGM') for the proprietors of Block C to vote on the issue of closure of the property. The plaintiffs then filed encl 26 prayer 1 seeking an order of the court for an ad interim injunction to prevent the defendant from shutting the said roller shutters. There were two important points to be decided by the court in the present case, firstly, when will a court grant an ad interim injunction pending the inter partes hearing of the injunction application, and secondly, whether a management corporation of a strata development could obstruct or hinder the rights of access of a strata owner to his property on ground of security.

Held, granting ad interim injunction order for encl 26 prayer 1 pending further inter partes hearing:

(1) It was undisputed that the Malaysian courts had the power to grant an ad interim injunction pending further inter partes hearing of the application for an interim injunction. A court should grant an ad interim injunction

if the court concluded on a prima facie view that irreparable damage may be done to the plaintiff by not preventing the continuance of the alleged nuisance or whatever other wrongdoing it may be by the defendant. The purpose was to preserve the status quo and without delving into the merits of the application as yet (see paras 30 & 33).

(2) The first plaintiff's rights were protected by art 13(1) of the Federal Constitution. The National Land Code ('the NLC') via s 44(1) also made it clear that a registered proprietor of land had exclusive use and enjoyment of his land. By virtue of s 34(1)(a) of the Strata Titles Act 1985 ('the STA') a proprietor like the first plaintiff shall have in relation to his parcel (in the case of a parcel proprietor), the powers conferred by the NLC on a proprietor in relation to his land (see para 37).

(3) The first plaintiff was the owner of the property, and his right of access should not be prevented by the defendant on the ostensible reason of security risks. What the first plaintiff wanted to do with its own land at any point in time was its own business and it was not for anyone to dictate. The fact that the first plaintiff had not previously insisted on the defendant to not obstruct its access to its basement carparks did not give rise to an estoppel to legitimise the actions of the defendant as a management corporation when such actions were beyond the jurisdiction and powers of the defendant under the STA and the Strata Management Act 2013 (see para 38).

(4) The second plaintiff was the tenant of the property to operate a 24-hour car park and his right of access should also not be prevented by the defendant on the ostensible reason of security risks. It was untenable for the defendant to argue that the plaintiffs, the plaintiffs' customers, and the car owners were still able to access their carparks via the staircases. Counsel for the defendant had no answer when the court asked him on how he expected the car owners to drive in or out via the staircases (see paras 42–43).

[Bahasa Malaysia summary

Plaintif pertama sebagai pemilik Basement 1 dan Basement 2, Blok C sebuah kompleks pejabat dan perniagaan ('hartanah tersebut') telah menyewakan hartanah tersebut kepada plaintif kedua untuk menjalankan perniagaan parkir kereta 24 jam automatik. Masalah timbul apabila pihak pengurusan bangunan ('defendan') memutuskan untuk menutup 'roller shutters' yang terletak di pintu masuk/keluar tunggal (untuk kenderaan) ruang bawah tanah plaintif setiap hari Isnin hingga Jumaat (dari 8 malam hingga 6 pagi) dan setiap hari Sabtu hingga Isnin berikutnya (mulai jam 2.30 petang). Defendan berhujah bahawa penutupan 'roller shutters' tersebut adalah untuk tujuan keselamatan dan defendan telah pun mengadakan mesyuarat agung luar biasa ('MALB') untuk pemilik Blok C mengundi mengenai isu penutupan hartanah tersebut.

Plaintif kemudian memfailkan lampiran 26 permohonan 1 bagi memohon perintah mahkamah untuk injunksi ad interim bagi menghalang defendan daripada menutup 'roller shutters' tersebut. Terdapat dua perkara penting yang perlu diputuskan oleh mahkamah dalam kes ini, pertama, bilakah mahkamah akan memberikan injunksi ad interim sementara menunggu perbicaraan inter partes permohonan injunksi, dan kedua, sama ada perbadanan pengurusan pembangunan strata boleh menghalang atau menahan hak akses pemilik strata kepada hartanya atas alasan keselamatan.

Diputuskan, memberikan perintah injunksi ad interim bagi lampiran 26 permohonan 1 sementara menunggu perbicaraan inter partes:

(1) Tidak dapat dipertikaikan bahawa mahkamah Malaysia mempunyai kuasa untuk memberikan injunksi ad interim sementara menunggu perbicaraan inter partes selanjutnya bagi permohonan injunksi interim. Mahkamah harus memberikan injunksi ad interim jika mahkamah membuat kesimpulan berdasarkan pandangan prima facie bahawa kerosakan yang tidak boleh diperbaiki akan menimpa plaintif jika dakwaan kacau ganggu atau apa-apa kesalahan lain yang mungkin dilakukan oleh defendan tidak dihalang daripada diteruskan. Tujuannya adalah untuk mengekalkan status quo dan tanpa menyelidiki merit permohonan tersebut (lihat perenggan 30 & 33).

(2) Hak plaintif pertama dilindungi oleh perkara 13(1) Perlembagaan Persekutuan. Kanun Tanah Negara ('KTN') melalui s 44(1) juga menjelaskan bahawa pemilik tanah berdaftar berhak mengguna dan menikmati secara eksklusif tanahnya. Berdasarkan s 34(1)(a) Akta Hakmilik Strata 1985 ('AHS') seorang pemilik seperti plaintif pertama hendaklah mempunyai, berhubung dengan petaknya (dalam hal pemilik petak), kuasa yang diberikan oleh KTN kepada seorang pemilik berhubung dengan tanahnya (lihat perenggan 37).

(3) Plaintif pertama ialah pemilik hartanah tersebut, dan hak aksesnya tidak seharusnya dihalang oleh defendan kononnya atas sebab risiko keselamatan. Apa yang plaintif pertama ingin lakukan dengan tanahnya sendiri pada bila-bila masa adalah urusannya sendiri dan bukan untuk ditentukan oleh orang lain. Hakikat bahawa plaintif pertama sebelum ini tidak mendesak defendan untuk tidak menghalang aksesnya ke tempat letak kereta bawah tanahnya tidak menimbulkan estoppel untuk menghalalkan tindakan defendan sebagai sebuah syarikat pengurusan apabila tindakan sedemikian berada di luar bidang kuasa dan kuasa defendan di bawah AHS dan Akta Pengurusan Strata 2013 (lihat perenggan 38).

(4) Plaintif kedua ialah penyewa hartanah tersebut bagi tujuan untuk mengoperasikan tempat letak kereta 24 jam dan hak aksesnya juga tidak harus dihalang oleh defendan atas sebab yang kononnya terdapat risiko

keselamatan. Adalah tidak dapat dipertahankan bagi defendan untuk berhujah bahawa plaintif-plaintif, pelanggan-pelanggan plaintif, dan pemilik-pemilik kereta masih boleh mengakses tempat letak kereta mereka melalui tangga. Peguam defendan tidak mempunyai jawapan apabila mahkamah bertanya kepadanya tentang bagaimana dia mengharapkan pemilik kereta memandu masuk atau keluar melalui tangga (lihat perenggan 42–43).]

Cases referred to

ECH Development & Management Sdn Bhd v Prabagaran a/l Perumal & Anor [2020] MLJU 516; [2020] 7 CLJ 451, CA (refd)

Jakob Renner (an infant suing through his father and next friend, Gilbert Renner) & Ors v Scott King, Chairman of Board of Directors of the International School of Kuala Lumpur & Ors [2000] 5 MLJ 254; [2000] 3 CLJ 569, HC (refd)

Jaks Island Circle Sdn Bhd v Star Media Group Bhd & Anor for another appeal [2020] 10 MLJ 386, HC (refd)

Pentamaster Instrumentation Sdn Bhd v QAV Technologies Sdn Bhd & Ors [2017] 11 MLJ 233; [2017] 5 CLJ 736, HC (refd)

Petrodar Operating Co Ltd v Nam Fatt Corp Bhd (in liquidation) & Anor [2014] 6 MLJ 189; [2014] 1 CLJ 18, FC (refd)

Rih Services (M) Sdn Bhd v Tanjung Tuan Hotel Sdn Bhd [2002] 3 MLJ 1; [2002] 3 CLJ 83, CA (folld)

Sodalite Sdn Bhd & Ors v 1 Mont' Kiara and Kiara 2 Management Corp & Ors [2021] 12 MLJ 116, HC (refd)

The incorporated owners of Tung Lo Court v Leung May Chun Alison Aliance formerly known as Sham May Chun also known as Leung, May-Chun Alison Aliance also known as Leung, May Chun Alison Alliance [2013] HKCU 1230 (refd)

Legislation referred to

Federal Constitution art 13(1)
National Land Code s 44(1)
Strata Management Act 2013
Strata Titles Act 1985 s 34(1)(a)

Alexia Lo (Alexia Lo & Co) for the plaintiffs.
Devan Narayanan Raman (Devan & Assoc) for the defendant.

Leong Wai Hong JC:

INTRODUCTION

[1] This judgment deals with two short but important points. The first point is that when will a court grant an ad interim injunction pending the inter

partes hearing of the injunction application. Ad interim is a legal phrase borrowed from the Latin ad interim ('in the meantime').

[2] The second point is whether a management corporation of a strata development can obstruct or hinder the rights of access of a strata owner to his property on ground of alleged security.

[3] At my postscript below I will also set out the caselaw whether the fact that I had subsequently granted the inter partes orders renders the appeal to the Court of Appeal against my ad interim injunction academic.

[4] The first plaintiff is the owner and registered proprietor of Basement 1 and Basement 2 Block C. Block C is an office and retail complex with two basement floors. The first plaintiff by a tenancy agreement let out the basements to the second plaintiff to carry out an automated 24-hour carparking business. The defendant is the management corporation of Block C.

[5] The plaintiffs filed encl 26 prayer 1 for an injunction to restrain the defendant from shutting the roller shutters located at the sole entrance/exit (for vehicles) of the plaintiffs' basements. The defendant has been closing the roller shutters from 8pm to 6am every Monday to Friday, from 2.30pm every Saturday to the following Monday 6am and on every Sunday and public holiday.

[6] No keys are given to the plaintiffs by the defendant to open these roller shutters.

[7] The defendant's defence is that the locking up is to prevent theft. The defendant further argues that the plaintiffs and the car owners are still able to access the carparks via the staircases and lifts.

[8] After hearing counsel on 21 October 2022 and 13 January 2023, I granted an ad interim injunction order that the car park roller shutters be kept open on a 24-hour and seven-day basis pending further inter partes hearing on 17 February 2023. The effect would be that the defendant is not allowed to bring the car park roller shutters down from 8pm to 6am every Monday to Friday, from 2.30pm every Saturday to the following Monday 6am and on every Sunday and public holiday.

[9] The defendant has filed an appeal to the Court of Appeal against my ad interim order dated 13 January 2023, notwithstanding that further inter partes

hearing for the injunction is fixed on 17 February 2023. These are my grounds of decision for the appeal to the Court of Appeal against my ad interim order dated 13 January 2023.

[10] The defendant has also filed for a stay of my ad interim order dated 13 January 2023 pending the appeal to the Court of Appeal against the ad interim order. I heard the application on an urgent basis on 20 January 2023. I refused a stay as the defendant has not shown special circumstances.

BACKGROUND FACTS

The pleaded case of the plaintiffs

[11] The pleaded case of the plaintiffs is as follows.

[12] The first plaintiff is the registered proprietor of Basement 1 and Basement 2 Block C ('subject property'). Block C is an office and retail complex with two basement floors. The first plaintiff by a tenancy agreement let out the subject property to the second plaintiff to carry out an automated 24-hour carparking business.

[13] The defendant is the management corporation of the said Block C, where the subject property is located.

[14] The second defendant by a license agreement engaged a company called Matrix Parking Solution Sdn Bhd to take over the car park services over the subject property with effect from 1 September 2022.

[15] Following the said license agreement, the first plaintiff sent an email dated 30 August 2022 to infoRMthe defendant, amongst others, to keep the said roller shutters to the subject property open on a 24/7 basis from 1 September 2022 onwards. The defendant was also informed that there would be a 24/7 monitoring of the subject property.

[16] The roller shutters are located at the sole entrance/exit (for vehicles) of the subject property. No keys are given to the plaintiffs by the defendant to open these roller shutters.

[17] The request was declined by the defendant solely on the ground of security.

[18] The defendant as the management corporation sought to defend its unilateral and unlawful closure of the subject property by calling for an EGM

for the proprietors of Block C to vote on the issue of closure of the subject property (see affidavit KHE (No 1) of Chong Joh Hong dated 14 October 2022 exhs P119 and P120).

The pleaded case of the defendant

[19] The defendant states that there are six access points from the Ground Floor to Block C. Each has roller shutters. Five of the access points at the Ground Floor is to the four lifts and three staircases for the building and the sixth entrance is a ramp leading down to the basements (see affidavit of Eslinda bt Emby dated 3 November 2022 at para 7).

[20] The defendant also states that at the basement there is equipment like Genset, Bomba pump, Syabas pumps, two air conditioning rooms and a motor LV room with an estimated value of RM1,150,000 (see affidavit of Eslinda bt Emby dated 3 November 2022 at para 8). I note that this estimated value is a mere scribbling by the defendant and a bare allegation unsubstantiated by invoices etc.

[21] The defendant further states that the developer who built Block C had closed the basement car ramp at 10pm during workdays and during holidays and later the JMB also did the same. Since the formation of the defendant they had followed the same practice (see affidavit of Eslinda bt Emby dated 3 November 2022 at para 10).

[22] The defendant states it was only recently that the plaintiff has requested that the basement car ramp be kept open 24 hours. The defendant declined to do so. The defendant contends that if the car park ramp is left open since no security guard is stationed there by the defendant, criminals can access Block C when it is empty and commit crimes. On some occasions when the staff is staying late in the offices they will be at risk and there is also a high chance of the expensive equipment of the defendant being stolen or damaged and offices will be robbed (see affidavit of Eslinda bt Emby dated 3 November 2022 at paras 12 and 13).

[23] The defendant states those who want to remain in the office after working hours (a rare instance) or on public holidays will move their cars out of the basement car parks as there are plenty of free DBKL parking bays available at that time (see affidavit of Eslinda bt Emby dated 3 November 2022 at para 15).

[24] Lastly, the defendant avers that it is unfair to stop the defendant from holding any EGM to decide on the issue of basement car part ramp and security (see affidavit of Eslinda bt Emby dated 3 November 2022 at para 36).

Court proceedings

[25] The plaintiffs filed encl 4 for interim injunctions. I heard counsel on 21 October 2022 and granted ad interim injunction orders until further order of court in respect of prayers 1(b) and 1(c) of encl 4. Further hearing was fixed for 13 January 2023. No appeal or stay was filed against my orders by the defendant.

[26] I did not grant encl 4 prayer 1(a) as it was unclear. Thus, the plaintiffs filed encl 26 prayer 1 in substitution and prayed for order in terms. I heard encl 26 prayer 1 on 13 January 2023.

[27] In essence, encl 26 prayer 1 is to prevent the defendant from shutting the roller shutters located at the main and sole entrance/exit (for vehicles) of the plaintiffs' subject property. The defendant has been closing the roller shutters from 8pm to 6am every Monday to Friday, from 2.30pm every Saturday to the following Monday 6am and on every Sunday and public holiday.

[28] In my view prayer 1 is a restraining injunction and not a mandatory injunction.

ANALYSIS OF THE COURT REASONS FOR GRANTING AD INTERIM ORDERS PENDING FURTHER INTER PARTES HEARING ON 17 FEBRUARY 2023

Do Malaysian courts have the power to grant an ad interim injunction?

[29] I start by setting out the law as I understand it.

[30] It is now undisputed that the Malaysian courts have the power to grant an ad interim injunction pending further inter partes hearing of the application for an interim injunction. See *Rih Services (M) Sdn Bhd v Tanjung Tuan Hotel Sdn Bhd* [2002] 3 MLJ 1; [2002] 3 CLJ 83 (CA); *Petrodar Operating Co Ltd v Nam Fatt Corp Bhd (in liquidation) & Anor* [2014] 6 MLJ 189; [2014] 1 CLJ 18 (FC) and *Pentamaster Instrumentation Sdn Bhd v QAV Technologies Sdn Bhd & Ors* [2017] 11 MLJ 233; [2017] 5 CLJ 736 (HC), Wong Kian Kheong JC.

[31] The law and principles applicable are well-summarised by Abdul Hamid JCA in the Court of Appeal in *Rih Services (M) Sdn Bhd v Tanjung Tuan Hotel Sdn Bhd* [2002] 3 MLJ 1; [2002] 3 CLJ 83, at paras 91–92. In a clear and instructive judgment Abdul Hamid JCA reviewed and set out the law and principles applicable to ex parte injunction order, ad interim injunction order and the inter parte injunction order in these terms:

Held:

[2] The case of *Cheah Cheng Lan v Heng Yea Lee* [2001] 1 MLJ 433; [2001] 1 CLJ 727 which decided that *an ex parte injunction cannot be extended beyond the 21 days*, was correctly decided. *The ex parte order automatically lapses after 21 days. However, it is the ex parte order that lapses and not the application. The application upon service is converted to an inter partes application. The application now inter partes still subsists* (p 90g).

[3] Even though the ex parte injunction order expired on 27 December 2001, the application was still in existence. In fact, it was still in existence on the day this appeal was heard. That being the case, the problem faced by the learned judge who for good reasons, could not hear the application inter partes on 26 December 2001 did not arise (p 91d-e).

[4] *The learned judge clearly had the jurisdiction to consider whether to grant an ad interim injunction pending the inter partes hearing of the application*. In *Jakob Renner v Scott King*, an ad interim injunction was granted pending the hearing of an application for an interim injunction which was to be heard inter partes (p 92b-e).

[5] *The ad interim injunction is not an extension of the ex parte order which expires after 21 days. It is a fresh order made on the converted inter partes application now before the court. When the court finally hears the application inter partes, the court will then decide whether to grant an injunction, inter partes. That will be a fresh order again* (p 92f).

[6] If the defendant wants to set aside the ex parte order, the defendant is at liberty to file an application for that purpose. It is at the hearing of that application that the court should decide whether to set it aside, if it has not lapsed. If in the meantime, the ex parte order has lapsed, the court should nevertheless hear the application, not for the purpose of determining whether to set it aside because it has lapsed, but for the purpose of determining whether it should have been made in the first place. This is necessary in order to determine whether damages should be awarded (pp 92h-i & 93a).

[7] It was wrong for the learned judge to set aside the ex parte order. *The fact that the ex parte order automatically expired after 21 days did not mean that it was wrongly granted in the first place*. Also, the fact that the application could not be heard inter partes within 21 days did not mean that it was wrongly given. Further, there was no application before the court to set aside the ex parte order (p 93b-d).

[8] The learned judge should not have made an order that the appellant make good its undertaking as to damages. The fact that an ex parte order automatically lapses after 21 days does not mean that the defendant is automatically entitled to damages. The question should have been whether the ex parte should have been made at all? Only if it should not have been made, should the order for assessment of damages be made. That had not been decided. There was not even an application for that purpose (p 93e). (Emphasis added.)

[32] The judgment of Abdul Hamid JCA in the Court of Appeal case of *Rih Services (M) Sdn Bhd v Tanjung Tuan Hotel Sdn Bhd* [2002] 3 MLJ 1 at pp 7–8; [2002] 3 CLJ 83 at pp 91–92 was expressly approved by Raus Sharif PCA at the

Federal Court in *Petrodar Operating Co Ltd v Nam Fatt Corp Bhd (in liquidation) & Anor* [2014] 6 MLJ 189; [2014] 1 CLJ 18 (FC) in these words:

> [27] ... It is the standard practice of our courts, that after the grant of the ad interim injunction (pending the inter partes hearing) to move on to the hearing of the inter partes injunction. Parties will then ventilate all issues and their respective contentions in the inter partes hearing of the injunction itself. In this regard *we are reminded of the observations made by His Lordship Abdul Hamid bin Mohamed JCA (as he then was) in RIH Services (M) Sdn Bhd v Tanjung Tuan Hotel Sdn Bhd* [2002] 3 CLJ 83; [2002] 2 AMR 2457 *which we are inclined to adopt in similar vein.* His Lordship Abdul Hamid bin Mohamed JCA noted that *the ad interim injunction to maintain the status quo pending the inter partes hearing is quite often agreed between the parties. Even if they do not agree the court has the jurisdiction to make such an order. The court has the jurisdiction to grant the ad interim injunction even in the event the parties disagree*. From the observations made by His Lordship Abdul Hamid Mohamed we can safely conclude that in the interest of smooth and expeditious administration of justice, parties should expeditiously move forward to the hearing of the inter partes injunction on the merits. Under the circumstances we find that it is not desirable to split the subject matter of a separate interlocutory application to set aside an ad interim injunction concurrently with the opposition to the inter partes injunction just on the issue of balance of convenience. As rightfully pointed out by learned counsel for the plaintiffs that to pick up an argument on balance of convenience issue and split it into the subject matter of a separate interlocutory application to set aside the ad interim injunction would result in multiplicity of proceedings and is a wastage of time and costs. In our judgment we find that it is more desirable and appropriate that the question of balance of convenience be argued and decided at the inter partes stage of hearing of the injunction. Thus, we find that the learned JC did not err in his findings on this point and he had correctly directed his mind to the relevant issues at hand when he held that:
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> Following the Supreme Court case of *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149; [1995] 1 CLJ 283 at pp 158–159, and applying *American Cynamid v Ethicon* [1975] 2 WLR 316, without the need to ascertain in a kind of detailed analysis the respective strength of the parties herein at this application to set aside the ad interim injunction stage, I am satisfied that on the surface at least, that there are serious questions for trial and even though they were not that serious, but nevertheless they could not be described as frivolous or vexatious. A more mature consideration of this issue of a serious questions to be tried can be further had at the hearing at the inter parte stage. (Emphasis added.)

What is the test for the grant of an ad interim injunction?

[33] In my view a court should grant an ad interim injunction if the court comes to the conclusion on a prima facie view that irreparable damage may be done to the plaintiff by not preventing the continuance of the alleged nuisance or whatever other wrongdoing it may be by the defendant. The purpose is to preserve the status quo and without delving into the merits of the application as yet (see *Rih Services (M) Sdn Bhd v Tanjung Tuan Hotel Sdn Bhd* [2002] 3

MLJ 1; [2002] 3 CLJ 83, at 91–92 and *Jaks Island Circle Sdn Bhd v Star Media Group Bhd & Anor for another appeal* [2020] 10 MLJ 386 at [60] (HC) Lee Swee Seng J).

[34] This proposition can be seen from the following passage by Abdul Hamid JCA in the Court of Appeal in *Rih Services (M) Sdn Bhd v Tanjung Tuan Hotel Sdn Bhd* [2002] 3 MLJ 1 at pp 7–8; [2002] 3 CLJ 83, at pp 91–92:

> (The judge) clearly had the jurisdiction to consider whether or not to grant an ad interim injunction pending the hearing inter parties of the application. *From my own experience, quite often parties would agree to such an order or the defendant would give an undertaking to maintain the status quo pending the hearing of the application inter partes. But even if they do not agree, the court has the jurisdiction to make such an order.*
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> *Such a practice has been adopted in England. In Beese and Others (managers of Kimpton Church of England Primary School) and Others v Woodhouse and Others* [1970] 1 All ER 769 (CA) the plaintiff having filed a writ and the statement of claim, took out a summons for an interim injunction. However, pending the hearing of the application inter partes, the judge granted an injunction, ex parte. The Court of Appeal held that the court below had the jurisdiction to do so. The headnote summarises the judgment thus:
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> > Where an application for an injunction cannot be heard by the court through no fault of the plaintiff or defendant, and *the judge comes to the conclusion on a prima facie view that irreparable damage may be done to the plaintiff by not preventing the continuance of the alleged nuisance or whatever other wrongdoing it may be by the defendant, he has jurisdiction to grant an ex parte injunction* (see p771 g, p 772g, and p 773j, post).
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> In this country Low Hop Bing J has also granted an ad interim injunction pending the hearing of an application for an interim injunction which was to be heard inter partes in *Jakob Renner (an infant suing through his father and next friend, Gilbert Renner) & Ors v Scott King, Chairman of Board of Directors of the International School of Kuala Lumpur & Ors* [2000] 5 MLJ 254; [2000] 3 CLJ 569. *The learned judge relied on a decision of the court in India in Jagjit Singh Khanna v Dr Rakhul Das Mullick & Anor* AIR [1988] Cal 9... (Emphasis added.)

[35] This is what Low Hop Bing J, when granting an ad interim injunction pending the hearing of an application for an interim injunction which was to be heard inter partes, said in *Jakob Renner (an infant suing through his father and next friend, Gilbert Renner) & Ors v Scott King, Chairman of Board of Directors of the International School of Kuala Lumpur & Ors* [2000] 5 MLJ 254; [2000] 3 CLJ 569:

> After the filing of encl 2, Dato' Dr Cyrus Das, the learned lead counsel for the plaintiffs, applied for the grant of an ad interim injunction. After perusing the application in encl 2 and all the Affidavits filed herein, I granted the ad interim injunction, on the basis of the decision of the court in India ie *Jagjit Singh Khanna v Dr Rakhal Das Mullick & Another* AIR [1988] Calcutta 95 where a panel of two

judges presided. AM Bhattacharjee J (in delivering the judgment of the court) explained *the two stages of a temporary injunction* in the following words:

> *A temporary injunction may as it very often does, consist of two stages, one granted without finally disposing of the application for injunction to operate immediately till the disposal of the said application* and the other granted while finally disposing of the main application to endure generally till the disposal of the suit and while *the former is generally classed as ad interim injunction,* the latter is generally called temporary injunction. Neither on principle nor on authority we find any bar to the Courts granting ad interim injunction till the disposal of the application for the temporary injunction. (Emphasis added.)

[36] In *Jaks Island Circle Sdn Bhd v Star Media Group Bhd & Anor for another appeal* [2020] 10 MLJ 386 (HC) Lee Swee Seng J held:

> [60] There is no need for the court to make a finding that the ad interim injunction and ad interim Erinford was wrongly or incorrectly granted. *That is because of the very nature of the ad interim orders which were given pending the hearing proper of the applications for the injunctions, to preserve status quo and without delving into the merits of the applications as yet.*
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> [61] It is different from an ex parte application where the requirements of a full and frank disclosure as well as any facts that may cause the court not to grant the injunction has to be clearly set out as required under O 29 r 1(2A) of the Rules of Court 2012. The plaintiff applicant is required to state 'any answer by the other party (or which he is likely to assert) to the claim or application' by reason of O 29 r 1(2A)(d) of the Rules of Court 2012. The plaintiff should also disclose to the court 'any facts which may lead the court not to grant the application ex parte or at all' by reason of O 29 r 1(2A)(e) of the Rules of Court 2012. (Emphasis added.)

Should I grant an ad interim injunction?

[37] The first plaintiff's rights are protected by art 13(1) of the Federal Constitution. The National Land Code via s 44(1) also makes it clear that a registered proprietor of land has exclusive use and enjoyment of his land. By virtue of s 34(1)(a) of the Strata Titles Act 1985 ('the STA') a proprietor like the first plaintiff shall have in relation to his parcel (in the case of a parcel proprietor), the powers conferred by the National Land Code on a proprietor in relation to his land.

[38] In my view the first plaintiff is the owner of the subject property and his right of access should not be prevented by the defendant on the ostensible reason of security risks. The fact that the first plaintiff has not used his basement carparks fully earlier does not mean that others like the defendant can encroach upon the first's plaintiff's land. What the first plaintiff wants to do with its own land at any point in time is its own business and it is not for anyone to dictate. The fact that the first plaintiff had not insisted on the defendant not obstructing its access to its basement carparks earlier does not give rise to an

estoppel so as to legitimise the actions of the defendant as a management corporation when such actions are beyond the jurisdiction and powers of the defendant under the Strata Titles Act 1985 and Strata Management Act 2013 ('the SMA').

[39] In *ECH Development & Management Sdn Bhd v Prabagaran a/l Perumal & Anor* [2020] MLJU 516; [2020] 7 CLJ 451, the Court of Appeal via Lee Swee Seng JCA made the following observations:

> [17] With one's registered title immune from any challenge *one gets to have exclusive use and enjoyment of one's title as provided for under s 44(1)(a) of the NLC* as follows:
>
> 44. ...
>
> ...
>
> [54] *The fact that the plaintiff has no practical use of the 51m2 land held under the separate title (Lot 80315) does not mean that others like the defendants can encroach upon the plaintiff's land. It may be of little use but it is nevertheless valuable to the plaintiff. As a matter of fact, what the plaintiff wants to do with its own land is its business and it is not for anyone to dictate or disparage.* (Emphasis added.)

[40] In *Sodalite Sdn Bhd & Ors v 1 Mont' Kiara and Kiara 2 Management Corp & Ors* [2021] 12 MLJ 116 (HC), Mohd Arief JC held that powers under the SMA are not to be exercised arbitrarily otherwise it would be unlawful and contrary to the SMA or STA, and that a management corporation cannot rely on estoppel to legitimise its actions not allowed by the SMA.

[41] In the Hong Kong case of *The incorporated owners of Tung Lo Court v Leung May Chun Alison Aliance formerly known as Sham May Chun also known as Leung, May-Chun Alison Aliance also known as Leung, May Chun Alison Alliance* [2013] HKCU 1230 Deputy District Judge R Lai said:

> [111] The DMC has authorised the IO to manage and repair common parts of the Building including common parts in the Basement (cll 5, 7 and 21 of the DMC). In fact, the BMO has imposed a duty on the IO to maintain and repair common parts of the Building (s 29 of the BMO). However, there are no express provisions in the DMC or the BMO authorising the IO to close the Basement to effect repairs.
>
> [112] I have to consider whether the IO has implied authority from the DMC or the BMO to close the Basement which includes not only common parts but also private properties of individual owners. *When the IO closed the Basement, it did not only deprive the owners of the Building of the use of the common parts in the Basement but also deprive the owners of the car parking spaces, including Madam Leung, of access to their private properties which in effect deprive them of the use and enjoyment of their own properties.*
>
> ...
>
> [115] The learned authors of Building Management in Hong Kong (by Malcolm Merry and Paul Kent 2nd Ed) had pointed out at pp 177–178 that:

A The common law would probably imply a term into the agency relationship for a manager to enter units, as a power necessarily incidental to the achievement of the purpose of managing the building. However, except in the case of an emergency, the manager would be required to give reasonable notice to the owners. Since 1987, such a term has been included in DMCs approved under B the LACO (the Legal Advisory and Conveyancing Office of the Lands Department) guidelines. The power is limited to the purpose of carrying out necessary repairs to the structure of the building and the common parts. The DMC must also provide for remedying any damage and liability resulting from the work.

C [116] It can be seen that even the guidelines issued by the LACO only allow a manager to enter the owners' units for the purpose of carrying out necessary repairs to the structure of the building and common parts. Such access may affect the owners' use of their properties but will not wholly deprive the owners of their use of their properties. *In this case, the act of the IO in closing the Basement had the effect of* D *depriving the owners of the use and enjoyment of their car parking spaces in the Basement. Without express and clear contractual or statutory provisions, the court shall be slow to accept that the law confers authority on the IO to deprive the owners of access to and consequently the use of their own private properties by way of implied provisions.*

[117] *Private property right is a fundamental right of the members of our society. The* E *court shall not interfere with such right lightly and readily.* I am of the view that absent express provisions in the DMC, only in exceptional circumstances, the court will agree that the IO may curtail the private property right of the owners to such extent in the name of discharging its duties to repair and manage the common parts of the Building.

F ...

[124] The reasons cited by *Tat Hing* in its said letter in support of its requiring the Basement to be closed were that it submitted its quotation on the basis that the Basement would be cleared for its works and its insurance policy did not cover non-workers. This does not mean that the repairs could not be carried out without G closure of the Basement, only that the contract price would be higher and Tat Hing's insurance cover would have to be extended probably at an added premium. *The fact that allowing the owners to access to their car parking spaces during the Works might cause some inconvenience to the Works and might make the Works cost more is no justification to deprive the owners of their private property right.*

H ...

[128] In *Oscar Toys Manufactory Ltd [2001–2003] HKCLRT 305, the respondent (Incorporated Owners of Granville House) laid down a rule which prohibited ingress into and egress from Granville House by any person between 11pm every day and 7 am of the following day (the 'Rule'). The applicant applied to the Lands Tribunal for an* I *order to set aside the Rule*. Prior to the implementation of the Rule, there had been numerous complaints from owners about the door locks of their units being prized and damages. The unit of the chairman of the management committee of the owners incorporation had also been burgled. *For the sake of security of the building and to save expenses in maintaining security, a resolution to implement the Rule was passed at the owners' general meeting on 15 August 1990*. The building had since been

kept at peace with no further incidents of burglary. The owners incorporation reviewed the Rule at owners' general meetings in 1998 and 2001. Most of the owners who attended the meetings resolved to continue implementing the Rule. There were incidents when people wished to leave the building after 11pm but were refused by the watchman. Police was called before these people were able to leave the building but *the Rule had not been challenged in the court until the applicant took out his application in 2002*

[129] *The respondent contended that if the Rule was set aside, the owners incorporation would have to employ another watchman which would substantially increase the management expenses and the previous security problem might also re-emerge.*

[130] *In setting aside the Rule, the Lands Tribunal held that the Rule had contravened the deed of mutual covenant of the building which provided for the use and enjoyment by the owners of the units that they owned* and for the use of the common parts of the building. *The learned judge did not accept the respondent's contention that the Rule did not deprive the owners of their right to ingress to and egress from the building but merely sought to restrict the time within which each owner, tenant and user could enter and leave their premises and the building.*

[131] *The learned judge also rejected the respondent's contention that it was the security of the building and the owners' safety that form the paramount consideration in determining whether the Rule was reasonable*. The learned judge was of the view that the key issue was whether the resolutions passed by the general meetings in respect of the Rule were in accord with the provisions of the deed of mutual covenant, not whether the Rule was reasonable. The learned judge also held that the contention that the Rule served to save management expenses that the owners had to bear did not constitute a valid defence.

[132] In this case, there are no express provisions in the DCM or the BMO authorizing the IO to close the Basement for repairs or renovation. Evidence adduced showed that the repairs to comply with the Building Order could be carried out without closing the Basement. It may be quicker and cheaper to carry out the Works with the Basement being closed but the IO failed to satisfy me that the closure was necessary. Mr Cheung submitted that it was reasonable for the IO to do so but reasonableness is really a non-starter to defend a claim for breach of contract, ie the DMC. I find that the IO was not entitled under the DMC to close the Basement for the purposes of carrying out the Works. *Whether the closure had been approved in the meetings of the Management Committee held on 30 September 2010 or 2 November 2010 made no difference.*

[133] *The IO is liable to Madam Leung's claim for breach of the DMC in respect of closure of the Basement* for the period from the evening of 14 November 2010 to 14 March 2011. (Emphasis added.)

[42] The second plaintiff is the tenant of the property to operate a 24-hour car park and his right of access should also not be prevented by the defendant on the ostensible reason of security risks.

[43] It is untenable for the defendant to argue that the plaintiffs and their customers the car owners are still able to access their carparks via the staircases.

Counsel for the defendant has no answer when I asked him how on earth does he expect the car owners to drive in or out via the staircases!

[44] The defendant has not furnished any cases to support its obstruction.

[45] On the contrary, the Hong Kong decision of *The incorporated owners of Tung Lo Court v Leung May Chun Alison Aliance formerly known as Sham May Chun also known as Leung, May-Chun Alison Aliance also known as Leung, May Chun Alison Alliance* [2013] HKCU 1230 held clearly that the steps taken by a management corporation to maintain security in a building cannot be at the expense of curtailing the rights of a property owner including his rights of access to his car park lots in the basement.

DECISION

[46] For the reasons above, on 13 January 2023 I granted an ad interim injunction order for encl 26 prayer 1 pending further hearing on 17 February 2023. I also ordered the ad interim injunction to commence only on the following Friday ie 20 January 2023 to allow the defendant time to comply.

[47] I further directed further inter parte hearing on 17 February 2023 for prayers 1(b) and 1(c) of encl 4 and encl 26 prayer 1 to allow parties to furnish more authorities in support of their respective positions.

[48] I record my appreciation to counsel for the plaintiffs for her diligence in her research that has greatly assisted me in my judgment.

POSTSCRIPT

What is the legal effect on the ad interim order granted since I have granted the inter parte injunction orders at the further hearing on 17 February 2023?

[49] I had granted the inter parte injunction orders at the further hearing on 17 February 2023.

[50] On its effect on the ad interim order granted and whether any appeal is academic, I refer to Raus Sharif PCA at the Federal Court in *Petrodar Operating Co Ltd v Nam Fatt Corp Bhd (in liquidation) & Anor* [2014] 6 MLJ 189; [2014] 1 CLJ 18 (FC) who opined:

> [28] In deliberation on the aforesaid question of law posed to us *we are also mindful of the fact that the ad interim injunction which formed the subject matter of the first defendant's application to set aside the ad interim injunction was discharged by the High Court on 30 August 2010 at the inter partes hearing of the same*. Having said that we are inclined to agree with the submissions of learned counsel for the plaintiffs that

there is at the moment no live subject matter for us to consider in the first defendant's appeal in the present case, after the first defendant's application to set aside the ad interim injunction had been dismissed by the High Court and the appeal therefrom was dismissed by the Court of Appeal. *Clearly, for the aforesaid reasons there is no purpose to pursue this issue any further. Accordingly in our judgment the balance of convenience question is academic as the ad interim injunction, which formed the subject matter of the first defendant's application to set aside the ad interim injunction, was already discharged by the High Court on 30 August 2010 after the High Court heard the inter parte application for injunction.* For the reasons adumbrated above we will answer the first question of law posed in the second appeal in the negative. (Emphasis added.)

[51] In *Jaks Island Circle Sdn Bhd v Star Media Group Bhd & Anor for another appeal* [2020] 10 MLJ 386 (HC) Lee Swee Seng J also held:

Whether there is a need for a finding from the court that the ad interim injunction was wrongly granted

[60] *There is no need for the court to make a finding that the ad interim injunction and ad interim Erinford was wrongly or incorrectly granted. That is because of the very nature of the ad interim orders which were given pending the hearing proper of the applications for the injunctions, to preserve status quo and without delving into the merits of the applications as yet.*

[61] It is different from an ex parte application where the requirements of a full and frank disclosure as well as any facts that may cause the court not to grant the injunction has to be clearly set out as required under O 29 r 1(2A) of the Rules of Court 2012. The plaintiff applicant is required to state 'any answer by the other party (or which he is likely to assert) to the claim or application' by reason of O 29 r 1(2A)(d) of the Rules of Court 2012. The plaintiff should also disclose to the court 'any facts which may lead the Court not to grant the application ex parte or at all' by reason of O 29 r 1(2A)(e) of the Rules of Court 2012.

[62] It cannot be just because the ad interim injunctions were granted by the court then the plaintiff cannot be made to honour its undertaking in paying damages to the defendant Star Media.

[63] *To hold otherwise would require a party like the defendant here to have to appeal against the ad interim injunction whilst awaiting the inter partes hearing of the applications for the injunction and the Erinford injunctions. Such a proposition only needs to be stated to be dismissed for its absolute absurdity and impracticability.* (Emphasis added.)

Ad interim injunction order for encl 26 prayer 1 granted pending further inter partes hearing.

Reported by Dzulqarnain Ab Fatar